

Book Review: The Legal Regime of Islands in International Law, by Derek W. Bowett

Leslie C. Green

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Book Review

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Book Reviews

THE LEGAL REGIME OF ISLANDS IN INTERNATIONAL LAW. DEREK W. BOWETT. Dobbs Ferry: Oceana; Alphen aan den Rijn, Neth.: Sijthoff & Noordhoff. 1979. Pp. vi, 377.

The demands that are being put forward by maritime states for an extended territorial sea, together with an exclusive economic zone, have made the problem of the legal regime of islands in international law of topical interest. Each island puts forward a claim to its own territorial sea, while island states also claim an exclusive economic zone. Moreover, the on-going United Nations Conference on the Law of the Sea in its Single Negotiating Text has apparently reached agreement on this matter. It is therefore useful to have Dr. Bowett's survey covering such varied geographic areas as the English Channel and the Southwest Approaches, the Aegean, the China Sea and the Gulf of Venezuela.

Unfortunately, problems relating to Canada are barely mentioned. There is a brief reference to the 1972 agreement with France but "certain very small islands such as Green Island, *Enfant Perdu* and *Petit Colombier* which lie in the middle of the channel were ignored. But Green Island is Canadian and *Petit Colombier* is French, so that they cancel each other out, in effect."¹ All that is said of the agreement of 1973 with Denmark is that it gives "full effect to offshore islands."² There is no reference to the current dispute with the United States over *Machias Seal Island*.

A problem that has arisen in the past, and has been somewhat cavalierly dismissed by states, relates to artificial islands. There is a tendency on the part of governments to refuse to recognize that such islands might enjoy any belt of territorial sea. This difficulty has become more significant with the increase in the number of offshore installations used in exploiting the resources of the seabed or in offshore oil drilling. In Dr. Bowett's view, the attitude toward the legal status of such installations, and the legal rights and duties dependent thereon, "will depend upon the location of the islands or installations, for the trend is towards a 'territorial' rather than a 'functional' approach to problems of maritime jurisdiction. . . . The developing law is moving towards concepts of belts of waters, within defined distances from coasts, and within which varying degrees of State jurisdiction are concerned."³ As a result, the situation may well differ from instance to instance.

¹ Bowett, *The Legal Regime of Islands in International Law* (Dobbs Ferry, N.Y.: Oceana; Alphen aan den Rijn, Netherlands: Sijthoff & Noordhoff, 1979) at 40.

² *Id.* at 158.

³ *Id.* at 117.

With respect to internal waters, however, there is no problem, and while, *prima facie*, it would appear that the same is true of the territorial sea, it must not be forgotten that the creation of an island there may well interfere with a third state's right to innocent passage or even cause siltage in a neighbour's territory. While it may be reasonable, as Belgium suggested,⁴ to require the publication of plans for such creations, the current trend to assert unfettered sovereignty appears to militate against this. Furthermore, as is made clear in the Negotiating Text, coastal states are determined to assert their right to consent to such creations, even over the continental shelf and within the economic zone.⁵ However, the Text also recognizes the right even of non-coastal states to create artificial islands as part of the freedom of the seas to which all are entitled⁶—if only they get their ships into that element!

If one looks at problems that have arisen with regard to the Falkland Islands, not considered by Dr. Bowett, or the current Greco-Turkish dispute over the Aegean islands,⁷ it becomes clear that a coastal state will often base its claim on an alleged right of contiguity. Dr. Bowett's discussion of this subject, in light of the arbitral awards in the *Palmas*,⁸ *Clipperton*⁹ and the *Minquiers and Ecrehos*¹⁰ cases makes clear the shallowness of such claims, and emphasizes that insofar as claims to islands are concerned, in the absence of historic title,¹¹ title rests on the same sort of evidence of administration as is required for any other territorial claim.¹² Occasionally, assertions of sovereignty, and the exercise thereof, follow claims originally put forward by nationals, as was the case with *Palmas*, secured by the Dutch East India Co., and as is illustrated by *Jones v. United States*.¹³ Perhaps more interesting from a Canadian point of view, in the light of claims being currently put forward by the indigenous peoples, is the decision in *Jacobsen v. Norwegian Government*,¹⁴ when the Norwegian Supreme Court affirmed that "individuals may establish property rights, as opposed to sovereignty . . . accept[ing] that the plaintiff had established property rights in part of Jan Mayen Island in 1921, some eight years before formal annexation by Norway as *terra nullius*."¹⁵ This decision, though seemingly not well-known in Canada, comes very close to decisions of the Canadian courts upholding Indian usufructuary rights while denying their sovereignty over the land.

It is clear from the references quoted that, while Dr. Bowett is most concerned with the legal regime of islands—particularly those that he has

⁴ *Id.* at 119.

⁵ *Id.* at 121-22.

⁶ *Id.* at 123.

⁷ *Id.* at 249-82.

⁸ *Island of Palmas Case* (1928), 2 R.I.A.A. 829.

⁹ *Affaire de l'Île Clipperton* (1931), 2 R.I.A.A. 1105.

¹⁰ *Minquiers and Ecrehos Case*, [1953] I.C.J. Rep. 47.

¹¹ *Supra* note 1, at 83.

¹² *Id.* at 37, 50-59.

¹³ 137 U.S. 202, 11 S. Ct. 80, 34 L. Ed. 691 (1890).

¹⁴ [1933] *Norske Retstidende* 511, 7 Ann. Dig. 109 (Norway, S.C.).

¹⁵ *Supra* note 1, at 59.

decided to study specially—there is much in his book that is of wider concern. This is only to be expected in light of his own conclusion that the problem is to be decided not on general grounds but on individual details and that, broadly speaking, the rules regarding the acquisition of territory and the enjoyment of the seas apply to the matters that he is examining by way of specific application of general rules.

By L. C. GREEN*

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* L. C. Green, University Professor, University of Alberta, Edmonton.